Case No. 20-CV-315

In the
DISTRICT OF COLUMBIA
COURT OF APPEALS

DUPONT EAST CIVIC ACTION ASSOCIATION, *et al.,*

Appellants,

v.

MURIEL BOWSER, *et al.,*

Appellees.

Appeal from the Superior Court of the District of Columbia in Case No. CAB4130-19 (Hon. Yvonne Williams, Judge)

REPLY BRIEF OF APPELLANTS

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Dated: January 29, 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

In their Opposition, Appellees (the "District") have wholly abandoned the Superior Court's principal basis (primary jurisdiction) for dismissing this case. To avoid outright conceding that the Superior Court wholly erred, the District has lit upon a standing argument that it deliberately did not make below, that Appellants (collectively "Dupont Citizens") did not thus have an opportunity to address, that the Superior Court never ruled upon, and that is, in any event, meritless.

Ignorning Supreme Court precedent that, as here, at the motion to dismiss stage, "general allegations" suffice to establish standing because those allegations are presumed to "embrace those specific facts that are necessary to support the claim" (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)), the District has embarked on a belated and inappropriate inquiry into the facts. As shown below, the District has caused and is causing Dupont Citizens injury of a type that this Court has previously recognized as conferring standing, including injury (i) to Dupont Citizens' aesthetic interests; (ii) to Dupont Citizens Civic Action Association's ("DECAA's") organizational purposes; (iii) from the forthcoming construction, and (iv) from violation of Dupont Citizens' constitutional rights. Further, Dupont Citizens' claims are "ripe," given that the Mayor's Agent has issued a final order, there are no more administrative avenues that they can pursue, and the above injuries have already occurred or are impending.

II. ARGUMENT

A. The District Has Waived Its Lack of Standing Argument.

The District, apparently recognizing that the standing argument was meritless at the motion to dismiss stage, deliberately declined to raise that argument in Superior Court,[1] which never ruled on that issue. Although this Court in its discretion may elect to address this issue for the first time on appeal, as an Article I court, it is not required to do so.[2] Here, the District has provided no explanation that would justify addressing the standing issue at this unusual juncture, particularly when Dupont Citizens could have easily resolved any technical standing issue by amending their Complaint. *See Baltimore v. Dist. of Columbia*, 10 A.3d 1141, 1144 n.2 (D.C. 2011) ("The question of the Committee's standing in the case before us was not properly preserved in the trial court[.]") This Court should likewise decline to address standing at this juncture.

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[1] The District's assertion that "defendants did not fully develop the issue of plaintiffs' standing in the Superior Court" (Opp. at 19 n.3) grossly overstates the District's contentions in their motion to dismiss. The District referred to (it goes too far to say it actually challenged) only the issues of DCAPA "prudential" standing and "third-party standing," both of which they have abandoned on appeal. *See* JA182 n.14 ("it is not clear" that plaintiffs objections "amount to more than generalized grievances[.]"); JA192 n.20 (noting that since third-party standing "is the exception rather than the norm, the burden is on plaintiffs to establish" it).

[2] *See Dist. of Columbia v. Walters,* 319 A.2d 332, 338 n.13 (D.C. 1974) ("courts of local jurisdiction of the District of Columbia, established by Congress pursuant to Article I, are not bound by the requirements of Article III.").

B. Dupont Citizens Have Adequately Alleged Standing With Respect to All the Complaint's Claims.

If this Court nonetheless elects to address the District's standing argument, Dupont Citizens have adequately alleged such standing. At the outset, the District neglected to cite to this Court's relevant, well-established standing principles applicable, as here, at the motion to dismiss stage:

> *At the pleading stage, plaintiff's burden in pleading injury is not onerous*. *Grayson v. AT&T Corp.,* 15 A.3d 219, 245–46 (D.C. 2011) (en banc); *Equal Rights Ctr. v. Post Props.,* 633 F.3d 1136, 1141 n.3 (D.C. Cir. 2011). We have held that "a complaint that contains 'general factual allegations of injury resulting from the defendant's conduct may suffice[.]'"

Equal Rights Ctr. v. Properties Intern., 110 A.3d 599, 603 (D.C. 2015). At the motion to dismiss stage, "general allegations" suffice to establish standing because those allegations are presumed to "embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 560-61. As shown below, the Complaint's claims fully meet the requirements of an "injury in fact; a causal connection between the injury and the conduct of which the party complains; and (3) redressibility." *Parou v. D.C. Alcoholic Beverage Control Bd.*, 70 A.3d 208, 211 (D.C. 2013). Although the District did not challenge Dupont Citizens' "prudential standing," as shown below, they likewise satisfy those requirements.[3]

[3] The District likewise does not challenge DECAA's organizational standing, which in any event it clearly has. *See Dupont Citizens Ass'n v. Barry,* 455 A.2d 417, 421 n.18 (D.C. 1983) (finding citizen association had standing "to assert the

1. Dupont Citizens Adequately Alleged Injury Sufficient to Confer "Injury in Fact" Standing.

The District asserts that DECAA has not sufficiently alleged an "injury in fact" with respect to two issues: the District's boundary determination and its "conceptual review" determination.[4] While standing should be demonstrated with respect to each claim,[5] here, the underlying "injury in fact" analysis for both these issues (as well as the Complaint's other claims) for the most part overlaps.[6]

a. General Allegations Are Sufficient. [E]ven slight injury is sufficient to confer standing[.]" *New York Republican State Comm. v. Secs. &*

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economic and aesthetic injuries claimed by its members"); *D.C. Tel. Answering Serv. Comm. v. Pub. Serv. Comm'n of Dist. of Columbia*, 476 A.2d 1113, 1119 (D.C. 1984) (organization "whose members are affected by" the order "may represent those members in a proceeding for judicial review of that order.")

[4] Oddly, the District spends the majority of its treatment addressing Dupont Citizens' challenge to the District's "conceptual review" determination (Opp. at 21-27), which is the focus solely of the Ninth Claim. The District also addresses Dupont Citizens' challenges to the District's boundary determination (Opp. at 27-29), which is the sole focus of Complaint's First, Fourth, Fifth, Sixth, and Seventh Claims and the principal focus of the Second and Third Claims. The District does not appear to challenge standing for the Complaint's other claims, including the failure to extend the Temple boundary (Eight Claim).

[5] *See D.C. Library Renaissance Project/West End Library Advisory Group v. Dist. of Columbia Zoning Comm'n,* 73 A.3d 107, 115 (D.C. 2013) ("*WELAG*"). Further, although this case seeks declaratory judgments, the "'actual controversy'" requirement [in the Declaratory Judgment Act], in turn, mirrors the "case or controversy" requirement of Article III[.]" *Grand Lodge of Fraternal Order of Police v. Ashcroft,* 185 F. Supp. 2d 9, 16 n.4 (D.C. Cir. 2001).

[6] If any Appellant has standing to raise a claim, then this Court has jurisdiction over that claim without regard to whether any other Appellant also has standing. *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 9 (D.C. Cir. 2017).

Exchange Comm'n., 927 F.3d 499, 504 (D.C. Cir. 2019) ("*NYRSC*"). "[G]eneral allegations" suffice to establish standing at the motion to dismiss stage because those allegations are presumed to "embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 560-61. Here, DECAA alleged that:

> Defendants' actions are causing, and will continue to cause, irreparable harm to DECAA, its members, and Individual Plaintiffs, thereby entitling them to declaratory and injunctive relief for multiple reasons[.]"

JA0032 (¶ 65). Such "general factual allegations of injury" are sufficient at the motion to dismiss stage. *Id.; see Grayson,* 15 A.3d at 245. Even if more detail were required, as shown below, the Complaint contains allegations that sufficiently assert injury in fact with respect to both the boundary and conceptual design issues.

b. <u>Irreparable Harm to Aesthetic Interests.</u> While acknowledging that "'threats to non-economic interest such as use and enjoyment may constitute an injury in fact,'" the District misguidedly asserts that such "'alleged threat[s]' to plaintiffs' enjoyment of the Temple and their quality of life are 'merely conjectural and hypothetical.'" Opp. at 24. Contrary to *Lujan*, the District is attempting to improperly impose a summary judgment standard on the Complaint's allegations. Those allegations are "assumed to be true at the motion-to-dismiss stage." *Attias v. CareFirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017).

In any event, this Court has recognized in numerous cases that threats to aesthetic interests confer standing. For example:

> While it is true that petitioner must plead the "real, perceptible, concrete, specific and immediate" injury that its members have suffered, *threats to the use and enjoyment of an aesthetic resource may constitute an injury in fact*. *Here, petitioner's pleading of injury was the asserted clash of the proposed design with the character of the historic district.* Also, petitioner's *asserted interest in preserving the integrity of the historical neighborhood* is well within the zone of interests arguably protected by the [Preservation] Act and so meets the second prong of the standing requirement. *Thus, in our view CA has established standing*.

Dupont Citizens Ass'n v. Barry, 455 A.2d 417 421-22 (D.C. 1983) (emphasis added). Numerous cases are to the same effect.[7]

The District's citation to *York Apartments Tenants Ass'n v. Dist. Of Columbia Zoning Comm'n,* 856 A.2 1079 (D.C. 2004), upon which it principally relies, is misplaced. As this Court later noted in upholding standing in circumstances similar to this case and distinguishing *York:*

> [B]ut [in *York*] we denied standing mainly because the petitioner's claims "amount[ed] to nothing more than an allegation of the right to

[7] *See, e.g., D.C. Renaissance Project/West End Library Advisory Grp. v. Dist. of Columbia Zoning Comm'n*, 73 A.3d 107, 113 (D.C. 2013) ("an allegation of specific and concrete interference with the use and enjoyment of a recreational or aesthetic resource suffices to support a conclusion of injury in fact"); *Downtown Cluster of Congregations v. Dist. of Columbia Bd. of Zoning Adjustment,* 675 A.2d 484, 490–91 (D.C. 1996) (association of churches had standing, where three member churches were located within two blocks of property at issue and association alleged that use variance would affect character of neighborhood, be adverse to maintaining "living downtown," and threaten churches' membership and programs); *Tiber Island Coop. Homes, Inc. v. Dist. of Columbia Zoning Comm'n,* 975 A.2d 186, 192 n.6 (D.C. 2009) ("our case law recognizes that neighbors whose everyday views would be affected by a proposed development are precisely the sort of people who have a sufficiently concrete and particularized interest in a zoning project to have standing to challenge that project in this court").

> have the Zoning Commission act in accordance with its rules and regulations." *Such generalized grievances were "not personal to the petitioner*." Moreover, the classroom/dormitory structure proposed in that case, *id.* at 1085*,* contrasts markedly with the sheer size and bulk of the extensive project being proposed here. . . . In light of the circumstances here, including . . . *the affidavits submitted in support of standing delineating the proposed project's impact on UMN members*, we are satisfied that UMN can challenge the Commission's order in this case."

Union Market Neighbors v. Dist. of Columbia Zoning Comm'n, 197 A.3d 1063, 1067 n.3 (D.C. 2018).

Here, Dupont Citizens claims are not "generalized grievances," and the threats here are far from "conjectural and hypothetical." Though at this stage not required, the Complaint's allegations have now been supported by sworn testimony in the Mayor's Agent Appeal ("MA Appeal") (Case No. 20-AA-0693), pending before this Court), of which this Court can take judicial notice.[8] For example:

- The Complaint asserts that the Luxury Project would "damage their neighborhood." JA0032 (¶67). A former senior Metro official with decades of experience in construction, testified at the Mayor's Agent Hearing that the Project posed "safety hazards," would damage the "foundations of surrounding properties," and would be "devastating to the community[.]" MA Appeal, Mot. to Stay (**MS Ex. 3)**.[9]

[8] *See Booth v. Fletcher,* 101 F.2d 676, 679 n.2 (D.C. Cir. 1938) ("court may take judicial notice of, and give effect to, its own records in another but interrelated proceeding"); *Karcher v. Islamic Republic of Iran,* Civ. No. 16-232 (CKK), 2018 WL 10742324 (Nov. 28, 2018) at *2 (same)*; Fletcher v. Pickwick, Inc.*, 140 A.2d 924 (D.C. 1958) (same).

[9] "**MS Ex**." refers to Motion to Stay exhibits submitted in the related appeal of the Mayor's Agent Order before this Court (Case No. 20-AA-693), as to which a motion to consolidate has been filed. Appellants respectfully request this Court to

- The Complaint alleges that the impending construction would reduce DECAA members' "quality of life." JA0032 (¶68). Declarations by six DECAA members living across the street or in close proximity to the Project stated, for example, that:

> The intrusion of this mammoth luxury complex will instantly and forever after alter the space, the peace, and the reflection of this historic place by DECAA members. Their aesthetic interests will forever be diminished and permanently tarnished by this intrusion on an historic landscape.[10]

DelleDonne Decl. ¶ 13 (**MS Ex. 19**).

- The Complaint alleges that Project would "reduce []light for residences of DECAA members" across the street. JA0033 (¶68). One DECAA member commissioned a light study that showed exactly that. Hays Decl. ¶ 59 (**MS Ex. 5**); *see also* Campbell Decl. ¶ 13 (**MS Ex. 21**).

- The Complaint alleges that the Project will "damage the value of the property owned by DECAA members[.]" JA0033 (¶ 68). An expert real estate appraiser's declaration estimated that construction of the Project would cause at least a $25,000 reduction the value of each home across S St. *See* Decl. of Tamora Papas dated Dec. 21, 2020 (**MS Ex. 28**) ¶¶ 4-6. *see also* Campbell Decl. 15 ¶ (**MS Ex. 21**); Hays Decl. ¶¶ 64-65(**MS Ex. 5**). Moreover, as one DECAA member testified: "the construction activity poses a substantial risk that I will lose existing tenants, who have already expressed their concern regarding the construction and agreed to move in only if I guaranteed them $1000 in moving expenses should the construction commence." Hays Decl. ¶ 63 (**MS Ex. 5)**.

c. <u>Injury to DECAA's Organizational Purposes.</u> The District misguidedly argues that "plaintiffs' opposition to the construction of the apartment

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take judicial notice of the filings in that case referenced herein should the Court deem it to be appropriate. *See* Appellant's Br. at 9 n.2

[10] *See also* DelleDonne Decl. ¶ 12 (**MS Ex. 19**); Campbell Decl. ¶ 11-12 (**MS Ex. 21**); Hanlon Decl. ¶¶ 3-10, 19-21 (**MS Ex. 22**); Hays Decl. ¶¶ 57-59 (**MS Ex. 5**); Green Decl. ¶¶ 11-13 (**MS Ex. 23**); Quinn Decl. ¶¶ 11-13 (**MS Ex. 24**); Ryan Decl. ¶¶ 10-15 (**MS Ex. 25**).

building, standing alone, is not a constitutionally cognizable injury." Opp. at 26. To the contrary, an organization suffers injury if the opposing party's actions "perceptibly impair" the organization's programs. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016); *see Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379, (1982) (same); *Downtown Cluster of Congregations v. Dist. of Columbia Bd. of Zoning Adjustment,* 675 A.2d at 490–91 (association of churches had standing, where administrative decision would "threaten churches' membership and programs). Here, the Complaint alleges that:

> DECAA is a non-profit organization whose purposes include promotion of the preservation of open spaces, and the historic, architectural, and aesthetic value of property, landmarks, and sites in the greater Dupont Circle area of Washington, D.C.

JA0015 (¶ 12). The Complaint asserts in detail how the District's actions interferes with those purposes.[11] Indeed, construction will "undermine" DECAA members' commitment to the organization. Campbell Decl. ¶ 10 (**MS Ex. 21**); Hays Decl. ¶ 56 (**MS Ex. 5**).[12]

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[11] *See, e.g.,* JA0032 (¶ 67) (May 23 Order's "causing turmoil" to DECAA and its members as they "take steps to prevent the Luxury Project from damaging their neighborhood."); *id.* (¶ 68) (May 23 Order's threatens "splendor of the Temple Landmark Site and the consequent enjoyment of DECAA, its members, and Individual Plaintiffs"). *See* DelleDonne Decl. ¶¶ 1, 11 (**MS Ex. 19**); Mot. to Stay at 23 ("construction will undermine [DECAA's] efforts to attract new members and may cause existing members to resign.").

[12] The District's reliance (Opp. at 26) on *Equal Rights Ctr. v. Prop. Int'l,* 110 A.3d 599 (D.C. 2015) is misguided. There, this Court *upheld* standing, concluding as the numerous cases cited above also have, that where "the defendant's unlawful

2. Dupont Citizens' Additional Injury in Fact Allegations Regarding the Boundary Determination.

In addition to the above, the Complaint also alleges additional "injury in fact" with respect to the boundary determination, including the following:

a. The Complaint's Legal Impediment Allegations. The Complaint alleges that the boundary determination eliminates a "legal impediment" to the development of the Luxury Project. JA0013. In response, the District myopically claims that the "only effect of the HPRB's May 2019 Order was to confine historic landmark protection to the site of the Temple itself, not to approve the subdivision or authorize any construction." Opp. at 27. This contention ignores what has *already* occurred, as the Mayor's Agent approved the subdivision *on the basis of the improper boundary determination*:

> The subdivision will "retain and enhance" the historic landmark because it *keeps the landmark site intact* and restores the boundary. . . . The subdivision also is "compatible with the character" of both the Sixteenth Street and Fourteenth Street Historic Districts because *it will retain the landmark site*[.] .

Mayor's Agent Order at 5-6 (**MS Ex. 1**) (emphasis added). Further, the Mayor's Agent relied on the fact that the subdivision would in turn permit the Luxury Project to proceed:

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actions have caused a 'concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources,'" standing is established. *Id.* at 604. Here, at the motion to dismiss stage, Dupont Citizens' allegations that the May 23 Order is causing DECAA "turmoil, expense, and enormous time and effort" (JA0032 ¶ 67) is sufficient.

> The subdivision enables the restoration of the historic landmark because *it facilitates a ground lease to provide a revenue stream that will finance much-needed restorations to the Temple*.

Id. at 5. Dupont Citizens' allegations that the improper boundary determination has harmed them is thus "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

That injury is substantial and continuing. The HPRB's improper boundary determination is precluding Dupont Citizens from obtaining a fair hearing before the Mayor's Agent because he concluded that "as long as the [HPRB's] boundary determination remains effective the Mayor's Agent has no authority to question or modify it." Mayor's Agent Order at 4; MA Appeal, Mot. to Consolidate, at 1-3.

b. <u>Allegations of Deprivation of Constitutional Rights</u>. "'[A] violation of constitutional rights constitutes . . . irreparable harm *per se.*'" *Dist. of Columbia v. Eastern Trans-Waste of Maryland, Inc.*, 758 A.2d 1, 15 (D.C. 2000).[13] Here, the Complaint alleges multiple constitutional violations with respect to the boundary determination, including the following. *First,* it alleges due process violations, including absence of an unbiased tribunal and lack of (indeed,

[13] "[S]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself.'" *Davis v. Dist. of Columbia,* 158 F.3d 1342, 1346 (D.C. Cir. 1998). Specifically, "a potential deprivation of [plaintiffs'] constitutional right to due process . . . outweighs the possible injury to defendants from enjoining enforcement until the merits of [the plaintiffs'] claim can be determined." *Gordon v Holder*, 826 F. Supp. 2d 279, 297 (D.D.C. 2011).

misleading) notice, allegations that must be taken as true for purpose of standing at this stage.[14] In response, the District asserts that "plaintiff DelleDonne, on behalf of DECAA, applied for the boundary expansion, such that plaintiffs had notice that the HPRB would be considering the landmark boundary and had an opportunity to be heard." Opp. at 29. The contention that the published Meeting Notice (JA0157) specifying review of a proposed "boundary *increase*" (emphasis added) provided notice of a proposed *decrease* in the boundary is almost laughable.

Moreover, the District's cite to various HPRB regulations requiring notice of an "application" (Opp. at 29) is indeed ironic. Those regulations require an "application" for a boundary decrease, and there was no such application here, as an HPRB official testified.[15] *See* 10-C DCMR §§ 204.1, 204.2 (specifying requirements for designation).[16] Dupont Citizens were not required to assume that HPRB would violate its own regulations.[17]

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[14] The District does not assert that Dupont Citizens have an insufficient property or liberty interest to entitle them to due process. In any event, they have sufficient interests. *See* Plfs.' Opp. to Mot. to Dismiss at 14-16 (JA0224-0226).

[15] *See* Dep. of Kim Williams dated Dec. 18, 2019 at 68 (**MS Ex. 30**) ("The application was for boundary expansion. That's what's being noticed."); 119 ("we did not have an application to determine the boundaries of what the landmark boundary should be. The application we had before us was to determine whether or not the boundary should be expanded").

[16] HPRB also failed to provide timely notice of a boundary application. *See* 10-C DCMR § 211.1 (requiring 45 days' notice).

[17] The District did not address the Complaint's allegation that the District deprived Dupont Citizens of their right to an unbiased tribunal. "The requirement

Second, the Complaint alleges that the District deprived Dupont Citizens of equal protection of the laws. "'[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute *or by its improper execution through duly constituted agents*.'" *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000) (emphasis added) (citation omitted) (finding violation of the equal protection clause where the complaint asserted the village demanded a longer easement from plaintiff than from others similarly situated). Here, the Complaint alleges the District adopted a unprecedented (as well as patently absurd) position in designating a revised site boundary for the Temple Landmark to permit the Project to proceed that it has not applied in any other instance, allegations that discovery in this case likewise proved true.[18] These violations are working a continuing harm on Dupont Citizens

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of an unbiased tribunal is fundamental to due process." *Rosen v. N.L.R.B.,* 735 F.2d 564, 570 n.10 (D.C. Cir. 1984). The DC Ethics Manual requires that: "A government employee *shall not* participate in government action *that could affect her own financial interests*[.]" DC Ethics Manual (**MS Ex. 17)** at 4 (emphasis added). Here, however, the HPO official in charge of review of the Luxury Project (HPO Deputy Chief Steve Callcott) lives directly across the street from the Project in a house that he admitted was worth in excess of $1,000,000. Hays Decl. ¶ 54 (**MS Ex. 5**). Despite the fact that the Project's approval "could" obviously affect his "own financial interests," he refused to recuse himself. His review of the Project's merits "cannot possibly be unbiased." Compl. ¶ 86 (JA0036). *See* JA0230 (rebutting District's claims re biased tribunal).

[18] *See* JA0023-0027; 0040-0041; Appellants' Br. at 24 n.11.

because they preclude them from receiving a fair hearing regarding the subdivision approval before the Mayor's Agent in violation of their constitutional rights.

In response, the District argues that Dupont Citizens had no standing to assert these claims because "they have not alleged that they suffered any actual harm as a result of the HPRB's allegedly disparate treatment of the Temple boundary determination." Opp. at 29. To the contrary, the Complaint alleges that the equal protection violations "is causing and will continue to cause DECAA, its members, and Individual Plaintiffs to sustain injury that is redressable by this Court." JA0040 (¶ 113). No more was required at the motion to dismiss stage. *See Grayson,* 15 A.3d at 245 ("general allegations" sufficient at motion to dismiss stage); *Eastern Trans-Waste*, 758 A.2d at 15 ("'a violation of constitutional rights constitutes . . . irreparable harm *per se.*'"). Moreover, by removing the legal impediment to the Luxury Project, the equal protection violation is directly causing all the damages set forth herein.

3. Dupont Citizens Alleged Sufficient Injury in Fact Regarding the "Conceptual Design" Determination.

The District belatedly asserts that Dupont Citizens have no standing to challenge the District's approval of the conceptual design in the HPRB's May 23, 2019 Order, which is the subject of the Complaint's Ninth Claim. As detailed above in Section II.B.1.b., this Court repeatedly has found that threats to aesthetic interests sufficiently allege an injury in fact. Indeed, specifically with respect to

the conceptual design issue, this Court has found that "a petitioner's pleading of *injury was the asserted clash of the proposed design with the character of the historic district*" sufficiently alleged injury in fact. *Dupont Citizens Ass'n*, 455 A.2d at 421-22 (emphasis added).[19]

Here, the Complaint alleges that the Luxury Project:

- is far too massive for the neighborhood;
- its 5 stories would block the view of the Temple from most angles, and block the sun from residences on S Street;
- unlike any building in the area, it would have two levels of subterranean cellar units and a ditch 5 feet wide and 15 feet deep surrounding the building, and residents would have to descend 25 steps below ground to reach the doors of their living units; and
- is otherwise incompatible with the Temple Landmark and the Sixteenth Street Historic District and Fourteenth Street Historic District.

JA0048 (¶ 136). These allegations sufficiently allege injury in fact.

The District's principal contention is that the conceptual design determination did not "adversely affect[] or aggrieve" Dupont Citizens because such review "is preliminary to an application for a construction permit[.]" Opp. at

[19] *See also Union Market Neighbors v. Dist. of Columbia Zoning Comm'n*, 197 A.3d 1063, 1067 (D.C. 2018) (noting "sheer size and bulk of the extensive project being proposed here" compared with neighboring "modest dwellings," and finding standing); *Tiber Island Coop. Homes,* 975 A.2d at 192 n.6 ("neighbors whose everyday views would be affected by a proposed development are precisely the sort of people who have a sufficiently concrete and particularized interest . . . to have standing to challenge that project in this court").

22. The District's suggestion that the conceptual review is of no moment is belied by the very statutory provisions it cites. The Mayor's Agent "may consider the [HPRB's] recommendation on an application for conceptual review as evidence to support a finding" on an application, among other things, under "§ 6-1106" for subdivision and under "§ 6-1107" for new construction. DC Code § 6-1108(c). Indeed, in ruling on the subdivision, the Mayor's Agent relied on the HPRB approval of the conceptual design. He found that the fact that the:

> HPRB has found the concept plan for the building to be compatible with the character of the historic district supports that the lot itself is consistent with the character of the historic district.

MS Ex. 1 at 7. Dupont Citizens are surely aggrieved when the Mayor's Agent relies upon an HPRB decision that they have asserted was derived in violation of law, and where in the absence of the Ninth Claim they would have no opportunity to rebut because the Mayor's Agent concluded he had no jurisdiction to review the HPRB decision. *See, e.g., Ralls Corp. v. Comm. On Foreign Investment,* 758 F.3d 296, 318 (D.C. Cir. 2014) ("Both the Supreme Court and this Court have recognized that . . . the opportunity to rebut the evidence supporting that action are essential components of due process."); *Greelee v. Bd. of Medicine of Dist. of Columbia,* 813 F. Supp. 48, 57 (D.D.C. 1993) (same).

4. Dupont Citizen Meet Prudential Standing Requirements.

The District does not claim Dupont Citizens fail to satisfy prudential standing requirements for good reason. Decisions of this Court establish that they satisfy this requirement.

> Under prudential standing requirements, a plaintiff "may not attempt to litigate generalized grievances, and may assert only interests that fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." . . . "[T]o establish standing under the DCAPA to challenge an agency order, the petitioner must allege ... that the interest sought to be protected ... *is arguably within the zone of interests* protected under the statute or constitutional guarantee in question ... and ... [there must not be a] clear legislative intent to withhold judicial review...."

WELAG, 73 A.3d at 114-16 (citation omitted). Here, the Complaint obviously does not assert generalized grievances. Further, the Complaint's constitutional claims "arguably fall within the zone of interests" of the due process (Third, Fourth, and Fifth Claims) and equal protection (Sixth Claim) clauses of the Constitution. The remaining claims all fall with the zone of interests of the Preservation Act. *See, e.g., Dupont Citizens Ass'n,* 455 A.2d at 422 ("petitioner's *asserted interest in preserving the integrity of the historical neighborhood* is well within the zone of interests arguably protected by the [Preservation] Act").[20]

[20] *See also WELAG*, 73 A.3d at 117 ("the asserted interest of WELAG's members—the loss of the use and enjoyment of the existing library as a result of the approval of the PUD—falls within the zone of interests of that framework").

5. Dupont Citizens' Injury Is Impending and Sufficiently Probable to Satisfy Standing Requirements.

The District misguidedly claims that "any future harm that may result if the apartment building is constructed is far too remote to establish an imminent injury." Opp. at 28. This argument fails because, for the reasons noted above, Dupont Citizens have already suffered injury, including the damage to their constitutional rights. Moreover, the District's argument that the other damages that will flow from construction are too remote also fails a factual matter. Upon approval of the subdivision, the developer immediately proceeded to obtain zoning approval and record the lots, and a supporter announced that utility work would proceed immediately, with construction to start in the second quarter of 2021.[21] If Dupont Citizens were to await the actual beginning of construction, the District would undoubtedly claim that they unduly delayed and that laches barred relief. Moreover, to await the actual commencement of construction would entail emergency motions, with the concomitant strain on judicial resources, and makes no sense from a judicial economy standpoint.

Even if some of Dupont Citizens' harm were to be characterized as future harm, "'[s]tanding depends on the probability of harm, not its temporal proximity.'" *Virginia Sate Corp. Comm'n v. FERC,* 468 F.3d 845, 848 (D.C. Cir.

[21] *See Newsletter of Aaron Landry,* dated 11-17-20) ("Starting in the next few weeks, there will be some utility relocation work at 1733 16th Street NW. Full construction is anticipated to start in the second quarter of 2021.")

2006) *quoting 520 Michigan Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006). "An allegation of future injury may suffice if the threatened injury is "certainly impending," *or* there is a "'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (emphasis added).[22]

Here, the recent submission to this Court in the Mayor's Agent Case by the Applicant (collectively the Masons and its developer, Perseus TDC) conclusively establishes the construction is not only "probable," but virtually certain to occur, with the resulting harm. The declaration of a Perseus official details the timeline of the impending construction that the Applicant will follow. *See* Decl. of Adam Peters dated Jan. 14, 2021 ("Peters Decl.") ¶¶ 6-10 (filed in MA Appeal). In addition, Applicant has repeatedly stated its intention to build the Luxury Project, not only to this Court, but to government agencies in numerous filings; pressed forward with litigation seeking Project approval before the HBRB and the Mayor's Agent; and immediately recorded the subdivision once approved.

Even if this Court were to conclude that the construction were not sufficiently impending, at a minimum the above facts establish that there is a "substantial risk" of such construction with its attendant harm. The D.C. Circuit has held that:

[22] This "substantial risk" analysis is even more pertinent where, as here, a declaratory judgment is sought, and thus the "actual controversy" necessarily involves the risk of future harm.

> [T]he proper way to analyze an increased-risk-of-harm claim is to consider the ultimate alleged harm—such as death, physical injury, or property damage ...—as the concrete and particularized injury and then to determine whether the increased risk of such harm makes injury to an individual citizen sufficiently 'imminent' for standing purposes.

Food & Water Watch, Inc. v. Vilsack, 808 F.3d 905, 915 (D.C. Cir 2015).

The first stage of this inquiry, the ultimate alleged harm, has been detailed above in Section II.B. With respect to the second stage of the inquiry, the increased risk, standing "does not require certainty[.]" *NYRSC*, 927 F.3d at 504. "Instead, it understandably holds a plaintiff's risk of harm cannot be based upon a "highly attenuated chain of possibilities." *Id.* Indeed, numerous cases have found that even uncertain future events pose sufficient "risk" to confer standing.[23]

Here, the Applicant's Peter's Declaration conclusively establishes that at a minimum there is a substantial risk that the Applicant will proceed with the construction. Peters Decl. ¶¶ 6-10. There is no "highly attenuated chain of possibilities" that would preclude standing. *NYRSC,* 927 F.3d at 504.

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[23] *See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970) (finding standing where competitors were preparing to enter market); *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (same); *NYRSC,* 927 F.3d 499 (party had standing despite fact that injury depended upon uncertain future event); *Organic Trade Ass'n v. U.S. Dept. of Agriculture*, 370 F. Supp. 3d 98, 109 (D.D.C. 2019) (finding standing where "injury" not yet occurred, but agency "has taken concrete steps"); *Signorelli v. Evans,* 637 F.2d 853, 858 (2d Cir. 1980) (holding challenge justiciable even where harm may not materialize in future)*; Roman Catholic Archdiocese of NY v. Sebelius*, 907 F. Supp. 2d 310, 328 (E.D.N.Y. 2012) (same).

C. Dupont Citizens' Claims Are Ripe.

The Superior Court never ruled upon the District's make-shift ripeness claim with respect to the boundary dispute. In any event, it too is meritless. Ripeness is a justiciability doctrine designed:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in *abstract disagreements* over administrative policies, and also to protect the agencies from judicial interference *until an administrative decision has been formalized* and its effects felt in a concrete way by the challenging parties.

Abbott Labs. v. Gardner, 387 U.S. 136, 148–149 (1967) (emphasis added).

> Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.

Id. at 149. Once the "scope of a controversy" has been reduced "to manageable proportions" and "its factual components fleshed out by some concrete action applying the regulation to the claimant's situation in a fashion that harms or *threatens to harm him*," the issue is ripe. *Lujan,* 497 U.S. at 891 (emphasis added).

> Although standing and ripeness are considered separate issues, in practice they involve overlapping inquiries. If no injury has occurred, the plaintiff could be denied standing or the case could be dismissed as not ripe.

Kardules v. City of Columbus, 95 F.3d 1335, 1343 (6th Cir. 1996). Here, Dupont Citizens' claims are ripe for essentially the same reasons noted above with respect to standing. *See supra* Section II.B.5.

1. The Boundary Dispute Is Ripe.

The boundary determination was "final agency action" unreviewable except in the Superior Court, concrete because it determined the exact boundaries of the Temple Landmark Site, and is causing Dupont Citizens injury as set forth in detail above. This controversy is, therefore, ripe.

The District's counterargument is comprised of vague generalities that border on incomprehensible. *First,* it meritlessly asserts that the boundary dispute "'would benefit from deferring review"[24] (even though the boundary determination is final agency action, the Mayor's Agent having ruled he has no jurisdiction to consider the boundary issue); that the boundary dispute must "'arise[] in some more concrete and final form'" (even though the HPRB delineated an exact boundary that Applicant has now recorded through the subdivision); that its boundary determination "does not 'inflict a concrete injury' on plaintiffs 'at this time'" (as shown above, it does and also presents a substantial risk of injury);[25] and

[24] The District's reliance on *Local 36 Int'l Ass'n of Firefighters v. Rubin,* 999 A.2d 891 (D.C. 2010) for this proposition is misplaced. In that case, the Court determined that the dispute was not ripe because, among other things, "the facts appear to be in flux," noting that "[s]ince the local act was passed, the District's views have changed with regard to how (if at all) the act applies to FEMS employees." *Id.* at 896-97. Here, nothing has changed regarding the Applicant's intent to proceed with the Project.

[25] The District's reliance upon *Metro. Baptist Church v. Dept. of Consumer and Reg. Affairs*, 718 A.2d 119 (D.C. 1998) for this proposition is misguided. In that case, the Church asserted that the permit requirements attending historic designation unconstitutionally burdened its free exercise of religion. It was

that according Dupont Citizens with an ability to obtain court review when they have no further recourse would somehow "'be premature.'" Opp. at 36-37.

Second, the District argues that Dupont Citizens' claims are not ripe because withholding court consideration "'will not cause the parties significant hardship.'" Opp. at 37. This argument is essentially a rehash of its no concrete injury argument, which as established above, is meritless. It argues that "all of Lot 108 remains protected as part of either the Sixteenth Street or Fourteenth Street Historic Districts." In fact, as the Mayor's Agent found, the historic districts encompassing the Luxury Project will not preclude the Applicant from proceeding.

Third, while acknowledging that "'significant practical harm' on plaintiff's interests" is sufficient to show ripeness (Opp. at 38), the District asserts the claims are unripe because withholding court review "'will not cause'" such hardship. Opp. at 37. The injury Dupont Citizens are suffering and that is impending has been detailed above. The District's argument fails on that ground alone.

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deemed unripe because the Church had not "even attempted to assemble a permit application," and the Court could therefore "not know how burdensome the permit requirements may in fact prove to be." *Id.* at 130-131. The instant case is the polar opposite. Among other things, the boundary determination has been made, it formed the basis of the Mayor's Agent's subdivision approval, the risks it poses to Dupont Citizens is "certainly impending" or at a minimum poses "substantial risk" (*see supra* Section II.B.5) and it is precluding Dupont Citizens from exercising their due process rights to challenge the subdivision approval based on that determination. Moreover, with respect to the Complaint' Eight Claim (JA0045-47) challenging the rejection of DECAA's boundary extension request, unlike *Metro. Baptist,* DECAA filed an application and the HPRB has ruled upon it.

The District additional argument that the dispute is unripe because Applicant needs to obtain a construction permit from the Mayor's Agent to proceed, citing DC Code § 6-1107, is misplaced for the same reasons. Where there is a "substantial risk" that government approval is forthcoming, a dispute is not unripe. *See supra* Section II.B.5. Indeed, for good reason, the District cannot bring itself to argue that such approval is unlikely.[26]

In any event, numerous cases have rejected ripeness challenges even though the fact and effective date of the challenged agency action is uncertain.[27] Here, the "boundary clarification" is final agency action and presents an immediate threat to Dupont Citizens. *See supra* Section II.B.5.

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[26] Here, § 6-1107 provides that the Mayor's Agent "shall" issue the construction permit unless he finds that "the design of the building and the character of the historic district" are incompatible. The HPRB has already approved the conceptual design and the Mayor's Agent Order has already determined that the subdivision, which he approved based on the income stream the Project would produce, was "'compatible with the character' of both the Sixteenth Street and Fourteenth Street Historic Districts because it will retain the landmark site intact[.]" Order at 7.

[27] *See, e.g., Abbott Labs.* 387 U.S. 136 (permitting challenge to regulation whose effective date lay in the future); *Reckett Benckiser, Inc. v EPA,* 613 F.3d 1131, 1133 (D.C. Cir. 2010) (agency's interpretation of authority "sufficiently final agency action for review"); *Roman Catholic Archdiocese*, 907 F. Supp. 2d at 328 (court reviewed statutory scheme not yet effective because it was causing plaintiffs at least some "some present detriment"); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers,* 440 F.3d 459, 463-65 (D.C. Cir. 2006) ("[W]here . . . there are no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review.").

2. The Conceptual Design Dispute Is Ripe.

The Ninth Claim challenging HPRB's conceptual design approval is also ripe. That approval is a "formalized" administrative decision (*Abbott Labs*, 387 U.S. at 148) not subject to further administrative review,[28] yet it formed in part the basis for the Order rejecting Dupont Citizens' challenges to the subdivision. Similarly, it is not an "abstract disagreement over administrative policies," but has had a concrete effect on Dupont Citizens through the Mayor's Agent process. *Id.*

The District's ripeness contentions regarding the conceptual design review decision are similar to those it made with respect to the boundary determination and fail for the same reasons. The District simply overlooks the fact that if the HPRB's conceptual design review determination is not "ripe" now, it never will be. Dupont Citizens have no other avenue to challenge that determination because it is unreviewable through the Mayor's Agent administrative process.

The District's principal contention is that there is "'no concrete dispute between the parties' because Perseus still must obtain permit approval from the Mayor's Agent to construct the apartment building." Opp. at 32. However, this argument fails for the reasons noted above. Numerous decisions, including *Abbott Labs*., have found disputes ripe where there is a "substantial risk" that government

[28] *See* 10-C DCMR § 301.3 ("An application for conceptual design review is not subject to review by the Mayor's Agent").

approval is forthcoming. *See supra* Section II.B.5. Here, the District cannot argue that such approval is unlikely. *See supra* n. 25.

Second, the District argues that its action was not "'sufficiently final' because Perseus's design plans have not been formally approved under the Protection Act.'" Opp. at 33. This argument is essentially a rehash of the argument above and fails for the same reasons. While "'conceptual design reviews are not binding,'" (Opp. at 34), it nonetheless served as evidence in the Mayor's Agent hearing. Moreover, given the Mayor's Agent reliance on that conceptual design review, at a minimum it poses a substantial risk that Dupont Citizens should have an opportunity to rebut in court. *See supra* Section II.B.5.

Third, the District contends that "the record does not demonstrate 'the requisite certainty and effect of any alleged hardship' to plaintiffs of withholding court consideration." Opp. at 35. Here, as noted above, there is no other avenue to challenge the HPRB's determination other than through a court proceeding. The Mayor's Agent has already relied upon the HPRB's flawed determination in rejecting Dupont Citizens' challenges to the Applicant's subdivision request, so Dupont Citizens' challenge is ripe. Moreover, as to the new construction permit that must be issued, upon which the District so heavily relies for its lack of ripeness argument, the District concedes, as it must, that the Mayor's Agent can accept that conceptual design review as "evidence" of compatibility (as he has

already done), a necessary element in issuing the new permit. Further, DC Code § 6-1107 provides that the Mayor's Agent "shall" issue the permit unless he finds that "the design of the building and the character of the historic district" are incompatible," and he need not hold a public hearing if he finds such compatibility. DC Code § 6-1107(f). Thus, there is a substantial risk that the new construction permit may be issued based in part on a conceptual design determination that the District's approach would foreclose Dupont Citizens from ever challenging. The conceptual design determination is therefore ripe.

III. CONCLUSION

For the reasons set forth above, the trial court erred in dismissing this case without prejudice. The trial court's decision should be reversed, and the case remanded.

Respectfully submitted this 29th day of January, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th of January, 2021, a true and correct copy of the foregoing *Reply Brief of Appellants* was filed with the Clerk of the Court via the appellate efiling system and served on the following via the appellate efiling system:

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/s/ Barry Coburn
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